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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BOBBY LEE WILLIAMS, Defendant and Appellant.	F053858 (Super. Ct. No. MCR025262) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Conrad Petermann, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Paul A. Bernardino, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II. and III.

PROCEDURAL HISTORY

Appellant was charged with failure to register as a sex offender (Pen. Code, § 290)[1] and with having been convicted of four prior serious felonies (§ 667, subds. (b)-(i)) and having served a prior prison term (§ 667.5, subd. (b)).

On August 16, 2007, after a three-day trial, appellant's jury returned a verdict finding him guilty of the substantive offense. That same day appellant admitted the truth of the special allegations.

On September 14, 2007, the court denied appellant probation, declined a defense request to strike the prior conviction allegations under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, and sentenced him to a total term of 26 years to life in prison.

On September 18, 2007, appellant filed a timely notice of appeal. He contends that his conviction of failing to register is not supported by the evidence, that his jury was improperly instructed, and that his attorney did not provide effective representation. We will affirm.

FACTS

Appellant was released from state prison on Wednesday, May 24, 2006, on parole after a Madera County conviction of forcible rape in concert. He took an Amtrak train back to Madera and spent his first night after release with a friend. He could stay there only one night, however, because the friend was moving.

Within 24 hours of his release, as required, appellant met with parole agent and officer of the day Gloria Chadwick for an initial interview. During such an initial interview, a parolee is informed of any requirements for registration with the police or the sheriff, depending upon the parolee's place of residence. During appellant's initial interview, on Thursday, May 25, 2006, Agent Chadwick marked "Yes" and circled "PC

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[1]Further statutory references are to the Penal Code unless indicated.

Unless otherwise stated, we will refer to the version of section 290 that was in effect at the time of the offense alleged against appellant. (See Stats. 2005, ch. 722, § 3.5, eff. Oct. 7, 2005, operative Jan. 1, 2006.)

290" on the intake form. Chadwick testified that this meant she personally advised appellant to register within five days under section 290. In the comments section of the form, Agent Chadwick noted: "To register, 290 PC by 5-31-06." Chadwick directed appellant to meet with his assigned parole agent, Todd Cregar, on Friday, May 26, 2006.

Appellant spent the night of Thursday, May 25, 2006, at the Madera Rescue Mission (the Mission).

On May 26, 2006, appellant met with Agent Cregar and advised Cregar he was staying at the Mission. Appellant had not yet registered with either the police or the sheriff. Cregar directed appellant to register and noted in his parole file that appellant must register by May 31, 2006. Cregar informed appellant that appellant could not remain at the Mission. It was too close to a school to allow for appellant's residence.

Cregar arranged for appellant to stay at the Casa Grande Motel (the Motel) in Madera. He drove appellant and another parolee to that motel and directed both to register with the Madera Sheriff's Department since the Motel was located in the County of Madera. Appellant spent that night, Friday, May 26, 2006, at the Motel.

Cregar made a mandatory home visit within five days of placing appellant at the Motel, but appellant was gone from his assigned room and had taken all of his personal belongings with him. Cregar returned another day but appellant was still not present.

Appellant had moved to the home of a cousin in the City of Madera on Saturday, May 27, 2006. He had done so, according to his testimony, because he had been kidnapped and threatened by certain people who came to his room at the Motel. He had escaped but remained afraid of them. He made no attempt to contact Agent Cregar, and he did not register. He remained at the home of his cousin until his arrest on Saturday, June 3, 2006. At that time, he had been out of prison and in Madera for 10 days, not counting the day of his release. He had passed six full working days, not including the day of his release, in Madera. These were Thursday and Friday, the 25th and 26th of May, as well as Tuesday through Friday, May 30th through June 2d, 2006. Monday, May 29th, had been the Memorial Day holiday.

Appellant testified he had lived in Madera most of his life, his family lived in Madera, and he regularly returned to Madera upon his release on parole, which had occurred several times after his 1990 conviction for rape and burglary. Appellant said he tried to register at the Madera Police Department on Friday, May 26, 2006, before his visit with Agent Cregar, but he was turned away because he did not have an appointment or any identification.

Appellant acknowledged in his testimony that he was aware of his registration requirements. Evidence was presented that he previously had incurred parole violations for failing to comply with those requirements.

DISCUSSION

I. Was There Sufficient Evidence to Show Appellant Failed to Register Within the Meaning of Section 290?

Appellant contends the prosecution presented no direct or circumstantial evidence that he failed to register within the "five working days" specified in section 290. He notes there were only 10 days—not including the day of his release—during which he could have established a "residence" before his arrest and only six "working days" during that same period of time. Given his arrest on Saturday, June 3, 2006, appellant maintains, the five-working-day grace period of section 290 could have lapsed only with respect to a residence established on either Wednesday, May 24, 2006, or Thursday, May 25, 2006. In appellant's view, the evidence did not show that he had established a residence on either of those dates because (1) the friend's house, where he stayed the first night after his release, was not open to him for more than that night, and (2) the Mission, where he stayed on Thursday, May 25, was not open to his continued residence because it was in an area close to a school and thus closed to sex offenders.

A. The Information

The information charged in pertinent part:

> "COUNT 1 [¶] BOBBY LEE WILLIAMS did, on or about June 3, 2006, in the County of Madera, State of California, commit a FELONY, namely, violation of Section 290(a)(1)(A) …, in that the said [BOBBY LEE

WILLIAMS] being a person required to register upon coming into, and changing residence and location within a jurisdiction, based on a felony conviction; did willfully and unlawfully violate the registration provisions of … section 290."

B. Applicable Law

At the time of the alleged offense, section 290 stated in pertinent part:

"(a)(1)(A) Every person [who is required to register], for the rest of his or her life while residing in California, … shall be required to register with the chief of police of the city in which he or she *is residing*, or the sheriff of the county if he or she *is residing* in an unincorporated area or city that has no police department … within *five working days of coming into*, or changing his or her residence within, any city, county, or city and county …." (Stats. 2005, ch. 704, § 1, ch. 722, § 3.5, italics added.)

The trial court instructed the jury in CALCRIM No. 1170 (failure to register as sex offender) (Judicial Council of Cal. Crim. Jury Instns. (2006)) as follows:

"[Appellant] is charged with failing to register as a sex offender. To prove that [appellant] is guilty of this crime, the People must prove that, one, [appellant] was previously convicted of the crime of rape; two, [appellant] *resided in* Madera, California, or in an unincorporated area in Madera County, California; three, [appellant] actually knew he had a duty to register as a sex offender under … section 290, wherever he resided; and, four, [appellant] willfully failed to register as a sex offender with the police chief of that city or sheriff of that county within five working days of coming into or changing his residence within that city or county. Someone commits an act willfully when he or she does it willingly or on purpose." (Italics added.)

The purpose of the section 290 registration requirement is to assure that convicted sex offenders are readily available for police surveillance. The triggering of a sex offender's five-day notice period is a question for the jury. That question is not dependent upon whether the offender stayed at a residence five or more consecutive days. The duty to register arises when the sex offender enters a jurisdiction and ends when he or she leaves the jurisdiction. (*People v. Poslof* (2005) 126 Cal.App.4th 92, 103; *People v. Davis* (2002) 102 Cal.App.4th 377, 382.)

While the registration requirement of section 290, subdivision (a)(1)(A) applies only where the sex offender "is residing" in a given jurisdiction, appellant cites and we are aware of no authority for the proposition that a person "is residing" in a jurisdiction only when staying at a place of residence—that is, an address—that will remain open to that person. We reject this proposition, which confuses the concept of residing in a jurisdiction with having a place of residence there.[2]

In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Reversal on this ground is unwarranted unless it appears there is no sufficient substantial evidence to support the conviction. (*People v. Poslof, supra,* 126 Cal.App.4th at pp. 103-104.) We consider the evidence in the light most favorable to the judgment. We presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. On appeal, the test is whether substantial evidence supports the decision and not whether the evidence proves guilt beyond a reasonable doubt. The sole function of the appellate court is to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The standard of review is the same in cases where the prosecution relies upon circumstantial evidence. (*People v. Balkin* (2006) 145 Cal.App.4th 487, 491-492; *People v. Chan* (2005) 128 Cal.App.4th 408, 415-416.)

C. Analysis

Here, we believe there is more than sufficient evidence to support the conclusion, evidently drawn by the jury, that appellant began "residing" in Madera when he returned

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[2]The verb "reside" is defined by the Random House Dictionary of the English Language (1973) in pertinent part, as "1. to dwell permanently or for a considerable time: *He resides in Boston*." (At p. 1220.) Subdivision (a)(1)(C)(vii) of section 290 (currently § 290.011, subd. (g)), defines the term "residence" as "one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address …."

there upon his release from parole. He had grown up there and had family there. He was assigned a parole agent there, and he attempted to register there, according to his testimony, even before seeing his assigned agent. In essence, appellant began "residing" in Madera at the same time he came into Madera. Thus, he was required and failed to register within the five working days allotted him.

II. Did Inadequate Jury Instructions Deprive Appellant of Federal Constitutional Rights?*

Appellant contends the jury instructions reduced the prosecution's burden of proof and denied him due process of law, a fair trial, and the right to present a defense. He particularly contends the instructions were deficient because they (a) failed to define the term "residence"; (b) failed to define the term "working days" and to explain that Memorial Day, May 29, 2006, was a holiday; and (c) failed to include a unanimity instruction requiring the jury to unanimously decide the omission(s) attributable to him.

A. Failure to Define "Residence"

Noting that section 290, subdivision (a)(1)(C)(vii) defines the term "residence" as "one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there," appellant contends the trial court erred in failing to instruct the jury on how "residence" is defined in section 290 or that the statute requires registration only of addresses where the defendant resided "regularly." He maintains the only possible "regular" residences in the instant case were the Motel (where he stayed on Friday night) and the residence of his cousin (to which he moved on Saturday). He submits he did not have sufficient time to violate the law with respect to either of these residences.

As noted above, the trial court instructed the jury with CALCRIM No. 1170 (failure to register as sex offender) as follows:

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*See footnote, *ante*, page 1.

> "[Appellant] is charged with failing to register as a sex offender. To prove that [appellant] is guilty of this crime, the People must prove that, one, [appellant] was previously convicted of the crime of rape; two, [appellant] *resided in Madera*, California, or in an unincorporated area in Madera County, California; three, [appellant] actually knew he had a duty to register as a sex offender under … section 290, wherever he resided; and, four, [appellant] willfully failed to register as a sex offender with the police chief of that city or sheriff of that county within five working days of coming into *or changing his residence* within that city or county. Someone commits an act willfully when he or she does it willingly or on purpose." (Italics added.)[3]

The pattern language of CALCRIM No. 1170 does not include the statutory definition of the term "residence" (§ 290, subd. (a)(1)(C)(vii)). To the extent appellant is claiming the court should have instructed on the definition on its own initiative, a trial court's duty to instruct sua sponte on particular defenses is limited. Such a duty arises only if it appears the defendant is relying on such a defense or if there is substantial evidence supportive of such a defense and the defense is consistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) Here appellant's trial theory did not include an argument that he was not residing in Madera during the days between his release on parole and his arrest or even that he did not establish a residence when he stayed at the Mission.

Further, appellant again fails to distinguish between "residing in," which was the relevant question here, and having a "residence" that he changed, which was not a question here. No instructional error occurred.

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[3] "Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be understood by jurors." (Cal. Rules of Court, rule 2.1050(e).) The Judicial Council's adoption of the CALCRIM instructions simply meant they are now endorsed and viewed as superior to the CALJIC instructions. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465.)

B. Definition of "Working Days"

Appellant further argues the term "working days" in section 290, subdivision (a)(1) is crucial in this case, because if Memorial Day is not a "working day" within the meaning of the statute, then he did not violate the registration time requirement. He submits it was essential that the jury be instructed on the meaning of "working days" for purposes of section 290.

A court, in fulfilling its duty to instruct on the principles of law relevant to the issues raised by the evidence, must be sure that jurors are adequately informed on the law to enable them to perform their function. Courts need only give explanatory instructions when terms used in an instruction have a technical meaning peculiar to law. Commonly understood terms need not be defined for the jury, and it is sufficient if the words are given their fair meaning in accordance with the evident intent of the legislative body. (*People v. McCleod* (1997) 55 Cal.App.4th 1205, 1216.) In our view, the term "working days" does not have a technical meaning peculiar to law. A reasonable juror would comprehend that a legal holiday, such as Memorial Day, would not be a "working day" for purposes of the registration requirements of section 290. Moreover, because of the way in which appellant defended against the charges, the question whether the five "working days" had passed was not an issue at trial. Therefore, the court simply had no sua sponte duty to instruct.

Appellant's definitional challenge to the adequacy of the instruction must be rejected.

C. Unanimity Instruction

Appellant lastly contends the evidence showed "under the prosecution's theory of the case that [appellant] committed more than one omission to register which could have been the basis for conviction." Thus, he submits, the jury had to unanimously decide which omission or omissions, if any, were legally attributable to him. To that end, appellant claims there were at least four discrete ways that one could find a failure to register. He bases this contention on the four different abodes with which he had contact

after his release on parole: (1) the friend's place where he stayed on the night of Wednesday, May 24, 2006 (his first night in Madera after being released from prison); (2) the Mission, where he stayed on Thursday, May 25 2006; (3) the Motel, where he stayed on Friday, May 26, 2006; and (4) the relative's residence on B Street, where he stayed from Saturday, May 27, 2006, until he was arrested on June 3, 2006.

We disagree with appellant's assertion of "four discrete ways" from which the jury could find a failure to register. In actuality there was but one basis for the jury to find a failure to register—that appellant came into Madera as a resident and was required to register under section 290 within five days of doing so.[4]

Appellant's contention must be rejected.

III. Was Defense Counsel Ineffective at Trial by Failing to Request Appropriate Jury Instructions, to Move for Acquittal, and to Object to Evidence Relating to the Other Parolee?[*]

Appellant contends his trial counsel was ineffective by failing to (a) request appropriate jury instructions as outlined in part II., *ante*; (b) move for acquittal at the close of the prosecution's case-in-chief; and (c) object to evidence that Parole Agent Cregar's other parolee did, in fact, register under section 290.

A. General Law of Adequacy of Counsel

The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

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[4]We also note that failure to register under section 290 is a continuing offense, and a failure to register when one moves to a different residence is a continuing offense. (*People v. Meeks* (2004) 123 Cal.App.4th 695, 702-703.) A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. (*People v. Maury* (2003) 30 Cal.4th 342, 423.) No unanimity instruction is required where the acts proved constitute a continuous course of conduct. (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115.)

[*]See footnote, *ante*, page 1.

Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury*, *supra*, 30 Cal.4th at p. 389.) Attorneys are not expected to engage in tactics or to file motions which are futile. (*Id.* at p. 390; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

To establish ineffective assistance of counsel, the defendant must show that counsel's performance "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see also *People v. Hester* (2000) 22 Cal.4th 290, 296.) Courts have held it is not necessary to determine whether counsel's challenged action was professionally unreasonable in every case, however. If the reviewing court can resolve the ineffective assistance claim by first deciding whether there is a reasonable probability that the outcome would have been different absent counsel's challenged actions or omissions, it may do so. (*Strickland v. Washington*, *supra*, at p. 697.)

B. Failure to Request Adequate Jury Instructions

Appellant contends his trial counsel was ineffective by failing to request jury instructions that adequately defined the requisite elements of the charged offense.

As noted in part II., *ante*, neither the Judicial Council's CALCRIM pattern language nor the case law interpreting CALCRIM No. 1170 has approved or incorporated the technical, definitional language that appellant proposes. Moreover, as described *ante*, appellant confuses the concept of "residing in" and having a "residence." Finally, as

respondent notes, appellant cannot show a more favorable result would have occurred had defense counsel proffered a more technical instruction at trial.

C. Motion for Acquittal

Appellant contends the prosecution failed to adduce his exact date of entry into Madera, and defense counsel was ineffective by failing to address this evidentiary deficiency via a timely motion for acquittal (§ 1118.1).

The standard applied by a trial court in ruling upon a motion for judgment of acquittal (§ 1118.1) is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, i.e., whether from the evidence, including reasonable inferences drawn therefrom, there is any substantial evidence of the existence of each element of the charged offense. The purpose of a section 1118.1 motion is to weed out as soon as possible those instances in which the prosecution fails to make a prima facie case. The question before the trial court is whether the prosecution has presented sufficient evidence to present the matter to the jury for determination. The sufficiency of the evidence is tested at the point the motion is made and the question is one of law, subject to independent review. (*People v. Stevens* (2007) 41 Cal.4th 182, 200.)

During the People's case-in-chief, Madera Police Officer Jocelynn Beck testified she contacted parole officials after appellant was arrested on June 3, 2006. Officer Beck said she spoke with Agent Cregar and learned that appellant had been released on May 24, 2006. Agent Chadwick said individuals released from prison are to report to a parole office within 24 hours of their release. According to Agent Cregar, appellant met with Chadwick for an initial interview on May 25 and met with Cregar on May 26. Appellant reported he was staying at the Mission. Cregar asked for written proof that appellant had registered this residence but appellant said he did not have a copy of the registration.

Given the foregoing testimony, there was sufficient evidence in the case-in chief to show appellant failed to register within five days of coming into Madera on May 25,

2006. Thus, defense counsel was not ineffective by failing to move for acquittal under section 1118.1.

D. Evidence of a Fellow Parolee's Registration

During the People's case-in-chief, Agent Cregar testified he took two parolees, appellant and another individual, to the Motel on May 26, 2006. The other parolee was also part of Cregar's caseload. Cregar also said he had instructed them both to register that motel as their residence with the Madera County Sheriff's Department. The jury later sent the court a note asking whether the other parolee had in fact registered with the sheriff's department in accordance with Cregar's directions. The court discussed this question with defense counsel and the prosecutor outside the presence of the jury. During that discussion, the prosecutor proposed calling Cregar to the stand so he could answer this question. The prosecutor subsequently called Cregar to the stand and elicited his testimony that the other parolee had indeed registered as directed.

Appellant now contends what the other parolee did was irrelevant to any issue in appellant's trial and that his trial counsel was ineffective by failing to object to Cregar's testimony.

During closing argument, appellant's trial counsel began his closing argument by focusing on appellant's version of events. He pointed out that appellant went to the Madera Police Department and tried to register but the staff people on duty told appellant he did not have an appointment or appropriate identification and, therefore, could not register at that time. In framing his argument, defense counsel acknowledged the contrary testimony of Madera Police Officer Beck, who oversaw section 290 registrations between 2005 and 2007 and described the registration procedures of her office. Counsel nevertheless maintained his client was frustrated by the lack of identification and the inability to register despite his best efforts to do so. Moreover, counsel described appellant's sense of fear because of his interaction with the armed intruders. Counsel concluded, "He had to choose between a parole violation or his safety. So he chose his safety."

Under California law, it is not deficient performance for a criminal defense counsel to make a reasonable tactical choice. Reasonableness must be assessed through the likely perspective of counsel at the time. Because of the difficulties inherent in making such an evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. (*People v. Ochoa* (1998) 19 Cal.4th 353, 445-446.) In the instant case, defense counsel was faced with a critical inquiry by the jury. That inquiry related to the compliance of appellant's fellow parolee. Clearly, counsel could have interposed a vigorous relevance objection to the evidence proffered on that point. Upon reflection, however, counsel may have concluded that such an objection, if sustained, would have left matters unsettled for the jury. Instead of interposing an objection to Agent Cregar's testimony on recall, defense counsel attempted to turn it to his client's advantage by arguing that appellant made efforts to register with the Madera police, thus implying appellant was just as diligent as his fellow parolee at the Motel.

We cannot say that counsel did not make a reasonable tactical choice in dealing with the jury's inquiry and the trial court's rulings.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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LEVY, J.